

Hot Topics in Banking Rules

New SAFE Rules on FX Capital Account for Free Trade Zone

During a policy briefing in Shanghai on February 28 held by the Shanghai branch of the People's Bank of China in support of the foreign exchange administrative policy development in the China (Shanghai) Pilot Free Trade Zone (the "FTZ"), the Notice of the Shanghai Branch of the State Administration of Foreign Exchange on Printing and Distributing the Detailed Rules of Implementation on Providing Foreign Exchange Administration Support for the Development of the China (Shanghai) Pilot Free Trade Zone (国家外汇管理局上海市分局关于印发支持中国（上海）自由贸易试验区建设外汇管理实施细则的通知)(the "Notice") was introduced. This indicates the beginning of relaxing at a large scale the foreign exchange administration in the FTZ.

The key developments regarding the capital account items (资本项目) appear in the following six aspects:

1. Delegation of the authority over the foreign exchange registration under foreign direct investment

According to the previous foreign exchange

rules¹, foreign exchange matters under direct investment by foreign investors (such as those in relation to preparation, establishment, alteration, and liquidation) shall be registered with the State Administration of Foreign Exchange or its local counterpart (the "SAFE"). The Notice now, however, explicitly provides that the authority over the foreign exchange registration and amendment registration under such direct investment in the FTZ has been delegated to banks in the FTZ.

2. Discretionary settlement of foreign exchange funds of foreign invested enterprises

The Notice provides that the foreign invested enterprises in the FTZ may choose to settle their foreign exchange funds at their discretion. Before the introduction of this Notice, the foreign exchange rules require that the foreign

¹ Mainly including the Notice of the General Affairs Department of the State Administration of Foreign Exchange on Issues Related to the Standardization of the Business Operations of Cross Border Renminbi Capital Account Items (国家外汇管理局综合司关于规范跨境人民币资本项目业务操作有关问题的通知) issued on April 7, 2011, and the Notice of the State Administration of Foreign Exchange on Printing and Distributing the Provisions on Foreign Exchange Administration over Direct Investment Made by Foreign Investors in China and the Supporting Documents (国家外汇管理局关于印发《外国投资者境内直接投资外汇管理规定》及配套文件的通知) issued on May 10, 2013, etc..

invested enterprises can settle their foreign exchange funds only after completing such procedures as the submission of capital verification reports to banks and the review by banks for the authenticity of the underlying transactions². With the introduction of the Notice, now the regulatory framework in relation to the settlement of foreign exchange funds of the foreign invested enterprises in the FTZ has changed the administrative focus from the prior regulatory review to ex post statistics monitoring, which would better facilitate the daily operation of the foreign invested enterprises in the FTZ.

However, in terms of the use of the funds after settlement, the Notice still requires that the funds so settled cannot be used for such purposes as (i) doing any business beyond approved business scope, (ii) investing in securities (except if done by investment enterprises), (iii) directly or indirectly extending RMB entrusted loans, and (iv) purchasing real estates for non-self use purposes.

3. Raise the ceiling for the outbound lending by the enterprises in the FTZ

According to the previous foreign exchange rules³, the balance of outbound lending of a domestic lender shall not exceed 30% of its owner's equity, nor shall it exceed the agreed amount of Chinese investment for which the borrower has completed required registration

² Mainly Including the Notice of the General Affairs Department of the State Administration of Foreign Exchange on the Relevant Operating Issues concerning the Improvement of the Administration of Payment and Settlement of Foreign Currency Capital of Foreign-funded Enterprises (国家外汇管理局综合司关于完善外商投资企业外汇资本金支付结汇管理有关业务操作问题的通知) issued on August 29, 2008, and the Supplementary Notice of the General Affairs Department of the State Administration of Foreign Exchange on Issues Relating to the Improvement of Business Operations with Respect to the Administration over Payment and Settlement of Foreign Exchange Capital of Foreign-Invested Enterprises (国家外汇管理局综合司关于完善外商投资企业外汇资本金支付结汇管理有关业务操作问题的补充通知) issued on July 18, 2011, etc..

³ Mainly Including the Notice of the State Administration of Foreign Exchange on Foreign Exchange Control Issues Concerning Overseas Lending by Domestic Enterprises (国家外汇管理局关于境内企业境外放款外汇管理有关问题的通知) issued on September 9, 2009, etc..

procedures. Where it is necessary for a domestic enterprise to exceed the aforesaid proportions, the local SAFE where the lender is located shall make preliminary examination and subsequently submit such application to the central SAFE for verification and approval. The Notice now has increased the ceiling of the owner's equity to 50%. When a domestic enterprise needs to increase the aforesaid proportions, the SAFE will conduct relevant review on a case by case basis. This adjustment to raise the ceiling will better promote the cross-border financial activities carried out by the enterprises in the FTZ.

4. More freedom on outbound security business

Under the Notice of the State Administration of Foreign Exchange on the Issue of the Administration of External Guarantee by Domestic Institutions (国家外汇管理局关于境内机构对外担保管理问题的通知) issued on July 30, 2010, the outbound security by domestic entities is administered by the SAFE through balance administration via approval for quota (余额管理) or through approval for each case (逐笔审核), and there are various requirements in relation to such aspects as the ratio of net assets to total assets of the security provider and the secured party, the relationship between the security provider and the secured party, the profit making status of the secured party.

The Notice, however, provides that the enterprises in the FTZ may engage in outbound security at their discretion without prior approval from the SAFE, and has removed the limitation on those such as the net asset ratio of the security provider and the secured party, the profit making status of the secured party and the equity relationship between the security provider and the secured party. Based on the Notice, the enterprises in the FTZ will enjoy more freedom of carrying out

outbound security business, except completing the outbound security registration according to relevant rules and ensuring that the use of the funds under the outbound security is consistent with the purpose permitted under relevant rules.

5. Simplify the procedures for outbound financial leasing business

Under the Notice of the State Administration of Foreign Exchange on Further Improving and Adjusting the Policies on Capital Account Foreign Exchange Administration (国家外汇管理局关于进一步改进和调整资本项目外汇管理政策的通知) issued on January 10, 2014, when a financial leasing company or its project company carries out the outbound financial leasing business, within 15 working days upon the occurrence of external claims under such financial leasing transaction, it shall submit relevant materials to complete the registration for the external claims at the SAFE where it is located. This local SAFE shall review and examine the compliance and authenticity of the financial leasing transaction. However, the Notice has removed the requirement of approval for each case in relation to the external claims of the financial leasing companies in the FTZ, and instead requires only the registration of the incurred external claims. This development will accordingly better facilitate the development of the financial leasing business in the FTZ.

6. Improve the centralized operation and management of foreign exchange funds

Since the mid August of 2010, the SAFE has been running a pilot program in Shanghai for developing a RMB international trade settlement center, part of which provides the centralized management of regional or international funds settlement under relevant international trade orders (contracts). The

Opinions of the People's Bank of China on Providing Financial Support for the Development of the China (Shanghai) Pilot Free Trade Zone (中国人民银行关于金融支持中国(上海)自由贸易试验区建设的意见) issued on December 2, 2013 allows the creation of a domestic foreign exchange fund pool in the FTZ for the purpose of collecting/pooling funds from the offshore affiliated companies, facilitating the centralized collection and payment, the centralized operation, and the two-way fund sweeping with domestic RMB fund pool. With the business of "cross-border fund pooling/sweeping" under the pilot program approved in 2013, the method of the administration over the cross-border foreign exchange borrowings and lending by multinational companies has shifted from the requirement of approval for each case to the balance administration via the approval for quota. This means that the surplus funds can be remitted overseas and foreign exchange can also be remitted in without prior approval for each case. Multinational companies may open special accounts, including the primary account for international foreign exchange funds and the primary account for domestic foreign exchange funds. The former can be used to receive and manage the foreign exchange funds from offshore enterprises and the foreign debt proceeds borrowed from other offshore entities, and the latter can be used to receive and manage the foreign exchange funds from relevant domestic member enterprises.

The Notice has further improved the program of the centralized operation and management of the foreign exchange funds of the headquarters of multinational companies, and introduced the "primary account for domestic foreign exchange funds" to collectively refer to the domestic foreign exchange fund pool and international trade settlement center special account, and to cover the functions of such

fund pool and special account. The Notice has also changed the regulatory administration method from approval to filing in relation to various matters (including such matters as the creation of fund pool, outbound lending) under the pilot program involving the primary account for international foreign exchange funds and the primary account for domestic foreign exchange funds. It is expected that the Notice will offer more support to such activities as the RMB international trade settlement and the centralized utilization by multinational companies of their foreign exchange funds in the FTZ.

Given the above, we are of the view that the Notice has simplified and relaxed at a large scale the regulatory administration in relation to

the capital account items, encouraged the facilitation of cross-border fund flows and financing, put in place a new administrative method in a wide range (namely using the administrative method of “negative list”). It aims to start the free convertibility of capital account items, simplify the procedures for foreign exchange administration, promote the convergence of the “headquarter economy” and new types of trade or business, and the development of financial leasing business in the FTZ. With various reformative implementation rules gradually put in place in the FTZ, there will be more new policy development worth our attention.

Joey LU	Partner	Tel: 86-021-2208 6210	Email: lujy@junhe.com
Vincent YUAN	Associate	Tel: 86-021-2208 6202	Email: yuanyf@junhe.com
Emma WANG	Intern	Tel: 86-021-2208 6257	Email: wangmeng@junhe.com

This document is provided for and only for the purposes of information sharing. Nothing contained in this document constitutes any legal advice or opinion of Jun He Law Offices.

银行法热点问题

自贸区外汇资本项目新规

2月28日，中国人民银行上海总部在上海召开外汇管理支持自贸试验区政策通报会，发布了《关于印发支持中国（上海）自由贸易试验区建设外汇管理实施细则的通知》（以下简称《通知》），标志着上海自贸区的外汇管理开始大幅度放权。

一、直接投资项下外汇登记权限下放

根据现行外汇管理规定¹，外商境内直接投资项下的外汇业务（包括筹建、设立、变更、清算等事项）应在国家外汇管理局及其分支机构（以下简称外汇局）办理登记，而此次《通知》中明确规定将自贸区内直接投资项下的外汇登记及变更登记下放至自贸区内银行办理。

二、外商投资企业资本金意愿结汇

《通知》允许自贸区内外商投资企业实行意愿结汇。在此之前，国家现行外商投资企业结汇的相关规定均要求外商投资企业结汇前需经过向

¹ 主要包括2011年4月7日颁发的《国家外汇管理局综合司关于规范跨境人民币资本项目业务操作有关问题的通知》、2013年5月10日颁发的《国家外汇管理局关于印发〈外国投资者境内直接投资外汇管理规定〉及配套文件的通知》等。

银行提交验资报告、银行审验交易真实性等程序后方能结汇²。《通知》的出台意味着在自贸区范围内，针对外商投资企业结汇的监管框架由事前审核为主转变为以事后统计监测为主，更利于自贸区内外商投资企业的日常经营活动。

但在结汇资金用途上，《通知》仍然要求区内结汇资金不得用于经营范围之外用途、不得直接或间接用于证券投资（投资性企业除外）、不得直接或间接用于发放人民币委托贷款、不得支付购买非自用房地产价款等事项。

三、提高区内企业境外放款上限

根据国家现行外汇有关规定³，境内放款人进行的境外放款余额不得超过该境内主体所有者权益的30%，并不得超过境外借款人已办妥相关登记手续的中方协议投资额，如企业确有需要突破上述比例的，由放款人所在地外汇局初审后报

² 主要包括2008年8月29日颁发的《国家外汇管理局关于完善外商投资企业外汇资本金支付结汇管理有关业务操作问题的通知》、2011年7月18日颁发的《国家外汇管理局综合司关于完善外商投资企业外汇资本金支付结汇管理有关业务操作问题的补充通知》等。

³ 主要包括2009年6月9日颁发的《国家外汇管理局关于境内企业境外放款外汇管理有关问题的通知》等。

国家外汇管理局审核。《通知》中将该上限调整至所有者权益的 50%，确有需要超过该比例的，由外汇局按个案集体审议方式处理。该等比例的上调，将更利于区内企业从事跨境金融活动。

四. 对外担保业务自由度增加

2010 年 7 月 30 日颁发的《国家外汇管理局关于境内机构对外担保管理问题的通知》中规定，国家外汇管理局对境内机构提供对外担保实行余额管理或者逐笔核准的管理方式，同时在担保人和被担保人的净资产与总资产的比例、担保人与被担保人的关系、被担保人盈利状况等方面均有要求。

而此次《通知》规定区内企业提供对外担保可自行签约，无需在外汇局办理事前审批，并取消了担保人和被担保人净资产比例、被担保人盈利状况及担保人和被担保人之间股权关联条件的限制。从《通知》的内容可以看出，今后在自贸区内，除需按规定办理相应的对外担保登记并保证担保项下资金符合规定用途以外，区内企业可以更加自由的开展对外担保业务。

五. 简化融资租赁对外业务程序

2014 年 1 月 10 日颁发的《国家外汇管理局关于进一步改进和调整资本项目外汇管理政策的通知》规定，融资租赁类公司或其项目公司开展对外融资租赁业务时，应在融资租赁对外债权发生后 15 个工作日内，持相关材料到所在地外汇局办理融资租赁对外债权登记，所在地外汇局应当审核交易的合规性和真实性。此次《通知》中取消了区内融资租赁公司办理对外债权业务的逐笔审批，仅要求对发生的对外债权实行登记管理，从而为区内融资租赁业务的开展提供了更多便利。

六. 改进外汇资金集中运营管理

从 2010 年 8 月中旬开始，国家外汇管理局开始在上海开展人民币国际贸易结算中心外汇管理试点，其中包括为国际贸易订单（合同）提供区域或国际结算资金集中管理业务的试点。2013 年 12 月 3 日出台的《关于金融支持中国(上海)自由贸易试验区建设的意见》中允许在区内建立境内外币资金池，用于归集境外关联企业的资金，方便集中收付、集中运营，与境内人民币资金池可以双向互通。2013 年获批的“跨境资金归集”试点业务，将跨国公司的跨境外汇借款与放款由报批方式转变为统一额度管理，即公司多余的资金可在无需逐笔审批的情况下汇出境外，外币也可汇入境内。跨国公司可开立专户，包括国际外汇资金主账户和国内外汇资金主账户，前者用于集中运营管理境外企业外汇资金，及从其他境外机构借入的外债资金，后者用于集中运营管理境内成员企业外汇资金。

此次《通知》中进一步改进了跨国公司总部外汇资金集中运营管理，将境内外币资金池及国际贸易结算中心专用账户名称统一改为国内外汇资金主账户，功能也并入国内外汇资金主账户，同时将国际外汇资金主账户和国内外汇资金主账户所涉试点业务的行政审批（包括设立资金池、进行对外放款的审批等事项）改为备案制。可以看出，《通知》将为区内的人民币国际贸易结算以及跨国公司集中运用外币资金等方面提供更多的支持。

综上，我们认为，《通知》在资本项目上大面积的简政放权，鼓励跨境的资金流和融资的便利化，同时大幅度地实施新型的管理模式，即实行负面清单的管理模式，其目的在于启动区内资本项目可兑换、简化外汇管理流程、促进总部经济和新型贸易业态的集聚，以及融资租赁业务的发展。随着自贸区内各项改革细则的相继落地，今后将有更多新政策值得我们关注。

陆居轶	合伙人	电话：86-021-2208 6210	邮箱地址：lujy@junhe.com
袁屹峰	律 师	电话：86-021-2208 6202	邮箱地址：yuanyf@junhe.com
王 萌	实习生	电话：86-021-2208 6257	邮箱地址：wangmeng@junhe.com

本文仅为提供法律信息之目的，供参考使用，并不构成君合律师事务所的法律意见或建议。